No. 82-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO, and VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, and PALLA BANDS OF MISSION INDIANS, and THE SECRETARY OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL WILDLIFE FEDERATION, AMERICAN RIVERS CONSERVATION COUNCIL, CALIFORNIA TROUT, COLORADO WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL POLICY INSTITUTE, FRIENDS OF THE EARTH, FRIENDS OF THE RIVER, INC., IDAHO ENVIRONMENTAL COUNCIL, IDAHO WILDLIFE FEDERATION, IZAAK WALTON LEAGUE OF AMERICA, INC., MONTANA WILDLIFE FEDERATION, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, INC., OREGON WILDLIFE FEDERATION, SIERRA CLUB, TROUT UNLIMITED, VERMONT NATURAL RESOURCES COUNCIL, WILDERNESS SOCIETY, and WYOMING WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

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February 23, 1984

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission may reject license conditions found necessary by federal land management agencies to mitigate damage to federal reservations from private hydroelectric power projects located within such reservations.*

* Issues before this Court but not addressed in this brief are identified at 3, n.2.

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IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the National Wildlife Federation, American Rivers Conservation Council, California Trout, Colorado Wildlife Federation, Environmental Defense Fund, Environmental Policy Institute, Friends of the Earth, Friends of the River, Inc., Idaho Environmental Council, Idaho Wildlife Federation, Izaak Walton League of America, Inc., Montana Wildlife Federation, National Audubon Society, Natural Resources Defense Council, Inc., Oregon Wildlife Federation, Sierra Club, Trout Unlimited, Vermont Natural Resources Council, Wilderness Society, and Wyoming Wildlife Federation file this brief as amici curiae in support of respondents. Letters of consent from counsel for the parties have been filed with the Clerk.

The members of amici curiae organizations use the nation's rivers on national forests and other federal reservations for fishing, hunting, canoeing, kayaking, rafting, swimming, camping, bird watching, photography, and other forms of recreation. Many of these streams and rivers will be adversely affected by hydroelectric power development. However, far from opposing all hydroelectric development, amici curiae have actively supported the balanced development of this renewable resource.[1] Amici curiae see the environmental safeguards at stake in this litigation as critical to the maintenance of that balance.

A more detailed statement regarding the interests of amici curiae is set out as Appendix A to this brief.

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[1] For example, several of amici curiae filed briefs in this Court as amici curiae in support of the constitutionality of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601-2708 (1982)) (the Act provides incentives to encourage retrofiting of existing dams for power production), in *FERC v. Mississippi*, 102 S.Ct. 2126 (1982), and in support of the Federal Energy Regulatory Commission's "avoided cost" rule implementing the Act in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 103 S.Ct. 1921 (1983).

SUMMARY OF ARGUMENT

The principle issue in this case is a straightforward question of statutory construction arising under the Federal Power Act ("FPA" or "the Act").[2] The FPA charges the Federal Energy Regulatory Commission ("Commission")[3] with the task of licensing[4] virtually all non-federal hydroelectric power production in the nation.[5] In most instances the Commission has the final say (subject, of course, to judicial review) with regard to all issues affecting the license.

In granting this broad authority to the Commission, however, Congress carved out an important exception. Section 4(e)

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[2] This brief addresses the scope of the conditioning authority in section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1982). This provision, invoked here by the Department of the Interior to secure certain protections for respondent Indian Bands, is the same authority utilized by that department and other federal agencies to secure environmental mitigation for hydroelectric projects located on national forests and other federal reservations. (The term "reservations", as defined in the FPA, encompasses national forests and other withdrawn and acquired lands of the United States, except for national parks which receive protection under another statute. *See* this brief at 5, n.8.) The critical issue to amici curiae is the mandatory nature of the 4(e) conditioning authority. Of less practical concern, in the view of amici curiae, is the reach of that authority beyond the physical confines of the federal reservation. Consequently, amici curiae take no position on the question of whether a "reserved water right" is a "reservation" under the FPA. Nor do they address questions in this case relating to the rights of the Indian Bands under treaties, the Federal Power Act, 16 U.S.C. §§ 791a-825r (1982), the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712 (1891), and other applicable law.

[3] The term "Commission" refers both to the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission. *See* Department of Energy Organization Act, 42 U.S.C. §§ 7134, 7151, 7171-7177 (1982).

[4] FPA §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, 817(b) (1982). The Commission also issues preliminary permits (which secure an applicant's priority for a subsequent license), FPA § 4(f), 16 U.S.C. § 797(f) (1982), and exemptions from licensing requirements, FPA § 30, 16 U.S.C § 823a (1982); Public Utility Regulatory Policies Act §§ 405, 408, 16 U.S.C. §§ 2705, 2708 (1982).

[5] This licensing authority extends to all projects reached by the federal regulatory power under the commerce and property clauses of the Constitution. FPA § 4(e), 16 U.S.C. § 797(e) (1982); U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. IV, § 3, cl. 2.

of the Act—the same section which empowers the Commission to license projects—contains the following limitation:

> Provided, That licenses . . . within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

FPA § 4(e), 16 U.S.C. § 797(e) (1982).

The question in this case is simple. Does this statutory language "mean[ ] what it says"? *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Or, as petitioners would have it, should the Court "improve" upon the scheme laid out by Congress, and read into these words a new meaning such that the Commission—rather than the agencies charged with managing our federal reservations—becomes the arbiter of how much environmental protection is necessary?

ARGUMENT

This case arose over a diversion of water from the San Luis River in California. Petitioners Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District (hereinafter "developers") sought relicensing [6] of an irrigation project which produces some incidental hydroelectric power. The Department of the Interior ("Interior") sought to attach certain conditions to the license to protect the interests of respondents La Jolla, Rincon, San Pasqual, Pauma, and Palla Bands of Mission Indians. Developers objected to the conditions, and the Federal Energy Regulatory Commission ("Commission") rejected ten out of twelve of Interior's conditions.[7]

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[6] Developers initially sought relicensing of the project. However, the Commission decided to issue another "original" license because the scope of the project was substantially changed from that of the first license. This had the effect of mooting a dispute over whether the section 4(e) conditioning authority attaches to renewed as well as original licenses.

[7] Joint Appendix at 218-242, Commission's Brief at 5a-11a. The Commission's brief incorrectly identifies Interior's conditions 10, 11, and 12 as conditions 9, 10, and 11, respectively.

The case has grown into much more than a dispute over ten rejected conditions. The Commission maintains that Interior may not impose, but may only recommend to the Commission, conditions on the licenses it issues. If that is so, then neither may any other federal land management agency (hereinafter "land manager") impose conditions it finds necessary to protect those federal reservations [8] it is charged by Congress with managing.[9]

I. THE PLAIN MEANING OF SECTION 4(e) IS THAT THE CONDITIONS DEEMED NECESSARY BY FEDERAL LAND MANAGEMENT AGENCIES MUST BE INCLUDED BY THE COMMISSION IN HYDROELECTRIC LICENSES.

The dispute turns on the meaning of the following sentence. "[L]icenses . . . within any reservation . . . *shall be subject to and contain* such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." Federal Power Act ("FPA" or "the Act") § 4(e), 16 U.S.C. § 797(e) (1982) (emphasis added).

There is no disagreement among the parties to this case as to the plain meaning of these words. Federal land managers

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[8] Under the Federal Power Act, "reservations" is defined to include "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose; but shall not include national monuments or national parks". Federal Power Act § 3(2), 16 U.S.C. § 796(2) (1982). National Parks are excluded from the section 4(e) provision because they receive special protection under a separate statute prohibiting the construction of hydroelectric power projects within them, Act of March 3, 1921, ch. 129, 41 Stat. 1353 (1921).

[9] Conservationists' greatest concern is with national forest lands covering over 190 million acres, Land Areas of the National Forest System, U.S. Department of Agriculture, Forest Service, FS-383, at 1 (1983). It is estimated that in the next decade, 3,000 hydroelectric projects will be proposed for licensing on these lands alone. Letter of J. B. Hilmon, Acting Deputy Chief, Forest Service, to Christopher H. Meyer (Feb. 14, 1984) set out in Appendix B at B-5.

are charged under the FPA with determining which conditions are "necessary for the adequate protection and utilization" of federal reservations. The Commission's role in this respect is purely ministerial: it "shall" incorporate such conditions in any license it issues.[10] Indeed, the Commission appears to concede in its main brief that, if the plain meaning of section 4(e) governs, the decision of the Ninth Circuit on this question must be affirmed.[11]

II. THERE IS NO REASON TO DEPART FROM THE PROVISION'S PLAIN MEANING.

In urging the adoption of the plain meaning of section 4(e), amici curiae conservation organizations ("conservationists") do not contend that the Court is prohibited from scrutinizing the legislative history behind the Act.[12] The issue is not whether extrinsic evidence may be explored, but what happens when that exploration proves fruitless. On this point the law is also clear. "Absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In other words, in order to justify a departure from the plain

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[10] This mandatory language is in sharp contrast to other provisions of the FPA, such as section 14(b) dealing with federal takeover. "In any relicensing proceeding before the Commission any Federal department or agency *may* timely *recommend*, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects." FPA § 14(b), 16 U.S.C. § 807(b) (1982) (emphasis added). Clearly, had Congress wished to make section 4(e) conditions mere recommendations, it knew how to do so.

[11] "[In the decision of the Ninth Circuit below] the majority's reliance upon the plain language rule does not advance its position. It is true that Section 4(e) provides that the license 'shall' include the conditions which the Secretary deems necessary, but that does not end the inquiry." Commission's Brief at 20-21 (reference omitted).

[12] Such a blind approach to the law was abandoned long ago by this Court. "[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928)); *see Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940).

meaning of a statute, it must be demonstrated that the plain language of the act violates the legislative intent and leads to an "absurd result".[13]

A. The Purported "Conflict" Petitioners Have Discovered Between the Section 4(e) Proviso and the Rest of the Federal Power Act Is No Conflict at All, But Rather a Logical Division of Authority.

Petitioners advance four arguments to support their conclusion that the plain meaning of the section 4(e) proviso conflicts with the rest of the FPA, and must therefore be reinterpreted by the Court.

The first argument rests on the allegedly comprehensive nature of the FPA. The argument boils down to this: Because the FPA was intended to "centralize authority in the Commission", Commission's Brief at 21, Congress must not have intended section 4(e) to "undermine" the Commission's power, Commission's Brief at 20. To put it more bluntly, petitioners urge that the existence of a comprehensive organic act justifies the Commission in ignoring express congressional directives which limit its power under that act. Whatever merit this novel principle of law might otherwise have, the argument overlooks the obvious fact that each of the federal agencies involved operates under a comprehensive organic act.[14] The purported "conflict" posed by the ability of federal land managers to impose license conditions against the wishes of the Commission is no more real than the conflict one might find in the Commission's ability to license a project on federal lands which the land manager believes interferes with its comprehensive management of those lands. Such abstract conflicts are better resolved by reference to statute than through judicial guesswork.

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[13] "All laws are to be given a sensible construction; and a literal application of a statute which would lead to absurd consequences, should be avoided whenever reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1925). *See Atchison, Topeka & Santa Fe Railroad Co. v. United States*, 295 U.S. 193, 208 (1935) (dissent); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

[14] *See* this brief at 10, n.18

Next petitioners raise section 10(a).[15] FPA § 10(a), 16 U.S.C. § 803(a) (1982). Because the Commission is instructed under this section to license only those projects which are "best adapted to a comprehensive plan" for the river basin, petitioners argue that the Commission must therefore be able to reject conditions imposed by land managers under section 4(e). Commission's Brief at 19-20, n.25, 33; Developers' Brief at 33-

[15] Conservationists find ironic the Commission's reliance here on the mandate for comprehensive planning under section 10(a). Environmental organizations, Indian Tribes, and government fisheries agencies have sought repeatedly to persuade the Commission that section 10(a) does, in fact, require the preparation of comprehensive plans for river basins. *See, e.g.*, Joint Petition of the National Marine Fisheries Service and the Tulalip Tribes of Washington for Coordination of Proceedings, for Development of Data, and for Hearing, Project Nos. 4218, 4741, 4786, 4885, 5305, 5338, 5339, 5341, 5356, 5358, 5400, 5402, 5403, 5404, 5428, 5430, 5431, 5432, 5433, 5434, 5435, 5436, 5437, 5438, 5439, 5440, 5500, 5555, 5610, 5611, 5612, 6541, 5676, 5681, 5683, 5757, 5758, 5759, 5777, 5778, 5816, 5818, 5819, 5825, 5829, 5837, 5853, 5926, 6176, 6216, 6220, 6221, 6256, 6295, 6310, 6311, 6348, 6465, 6495, 6496, 6503, 6505, 6506, 6507, 6530, 6533, 6534, 6539, 6611, 6672, 6830 (filed Feb. 22, 1983) (Snohomish River Basin in Washington). Dozens of similar petitions have been filed on projects proposed within the Salmon River Basin in Idaho, the Willamette River Basin in Oregon, and the Wenatchee River Basin in Washington. To date these efforts have not been successful. While the Commission has yet to rule finally on any of these petitions, it has nevertheless issued preliminary permits over objections in the Salmon River Basin, Order Denying Appeals, *Lester Kelley, et al., Project Nos. 6442-000, et al.*, 25 FERC 61,410 (Dec. 22, 1983), the Snohomish River Basin, Order Issuing Preliminary Permit, *Great Northern Hydro Co., Project No. 7038-000*, 25 FERC 62,287 (Dec. 5, 1983), the Willamette River Basin, Orders Issuing Preliminary Permits, *Mountain West Hydro Inc., Project No. 7134-000*, 25 FERC 62,056 (Oct. 18, 1983); *Fall Creek Associates, Project No. 7082-000*, 25 FERC 62,092 (Oct. 24, 1983); *Hydro-Cor, Inc. Project No. 7176-000*, 25 FERC 62,096 (Oct. 24, 1983), and the Wenatchee River Basin, Order Denying Appeal, *Dryden Hydro Associates, Project No. 7030-001*, 26 FERC 61,135 (Feb. 6, 1984). Moreover, on September 15, 1983, the Commission rejected, by a 4-0 vote (former Chairman C. M. Butler was not present), a staff proposal to undertake cumulative environmental impact studies for multiple hydroelectric development projects within river basins. *Environmental Unit to Review Procedure to Assess Hydro Impact*, Monitor, Vol. III, No. 20, at 1 (Oct. 3, 1983) (the Monitor is the Commission's official monthly publication). In short, the section 10(a) mandate—which the Commission here finds to be so broad—is the same mandate which the Commission has construed so narrowly that in over fifty years it has never found it necessary to prepare a single comprehensive river basin plan.

34. How this conclusion follows is unclear. Section 10(a) is a general articulation of the "public interest" considerations which govern the Commission's licensing decisions. *Udall v. FPC*, 387 U.S. 428, 450 (1967). These general principles in no way erase the more specific constraints imposed under section 4(e).[16] Thus, while the Commission is guided by the section 10(a) public interest criteria in choosing the "best adapted" project, its universe for selection is limited under the FPA to projects whose harm to federal lands is mitigated through section 4(e) conditions.

Third, the Commission tells the Court that the first clause of the section 4(e) proviso conflicts with the second. Commission's Brief at 17-20. The first clause requires a finding by the Commission that "no interference or inconsistency" with the purposes of the reservation will result from the issuance of a license. The second clause contains the conditioning authority which is the subject of this litigation. There is no inconsistency here. The "no interference or inconsistency" finding is a go/no-go decision on the project. Congress withheld that power from the land managers and placed it in the hands of the Commission. Left to the land managers under the second clause is the authority, not to halt a project, but to specify mitigation measures. In so allocating authority between the agencies, Congress did not create a conflict. It struck a balance.

Finally, the Commission alludes to an "incongruous result" which it fears might flow from a literal reading of section 4(e). Commission's Brief at 19-20. What the Commission apparently has in mind is the possibility that the conditions imposed by a land manager might render a power project uneconomical and thereby in effect "veto" the license. Conservationists do not shrink from the implications of this hypothetical.[17] If a private

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[16] Specific statutory provisions control the general. *McEnvoy v. United States*, 322 U.S. 102, 107 (1944).

[17] Conservationists would emphasize, however, that the notion of arresting hydroelectric development via 4(e) conditions is nothing more than hypothetical. The practical impact of 4(e) conditions in the overwhelming majority of cases is to mitigate, not halt, development. Moreover any unreasonable conditions may be challenged by the applicant. *See* this brief at 18-19.

hydroelectric project on land reserved for public benefit cannot turn a profit unless mitigation measures are eliminated, then perhaps that project should not be built. There is certainly no reason to read a contrary result into a plainly worded statutory provision. If Congress wished to promote uneconomical hydroelectric development by curtailing mitigation measures, it is certainly within its power to do so. Section 4(e), however, reflects a different choice of policy.

A straightforward reading of the Act demonstrates that Congress intended to draw upon the special expertise of multiple federal agencies where federal reservations are concerned.[18] Recognizing their intimate knowledge and understanding of the natural resources under their control, Congress authorized federal land managers to require whatever mitigation measures they determine are necessary for projects located within their reservations.

In so doing Congress did not "undermine the very authority" of the Commission, Commission's Brief at 20. In fact, the Commission retains full authority to make those decisions which fall within its expertise. It is for the Commission, not the land manager, to weigh competing proposals for hydroelectric development. It is for the Commission to assess the economic feasibility and structural integrity of the various projects. It is for the Commission to set the licensing fees and annual charges. And it is for the Commission to forecast energy demands for the region and consider what investments will best serve the public good.

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[18] Federal land managers are charged under their organic and planning acts with broad management responsibilities. For example, Congress has created an intricate system of planning for all of the national forests. Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1687 (1982)); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 1600-1687 (1982)). These laws—which contain expressions of congressional will every bit as comprehensive and detailed as those found in the FPA—provide the Forest Service with guidelines encompassing everything from the selection of scientific committees to formulas to determine the allowable timber harvest on certain lands.

The land manager's responsibilities, on the other hand, are sharply circumscribed. The land manager must determine what mitigation measures are necessary for the "adequate protection and utilization" of the reservations under its authority, including, for example, the flows of water necessary to sustain fisheries, the devices required to permit fish migration, and the steps that must be taken to maintain water quality. In short, it is for the land manager to say what must be done to minimize destruction of public resources. These concerns may seem "parochial" to developers, Developers' Brief at 33, and the result "undesirable" to the Commission, Commission's Brief at 20, but to Congress the approach embodied in section 4(e) reflects something more substantial: a firm commitment to sound planning and balanced resource management.

B. The Commission Has Construed a Virtually Identical Provision of the Federal Power Act as Limiting Its Authority to Review Agency Conditions.

Section 4(e) of the FPA is not the only provision of federal power law authorizing other agencies to mandate binding conditions on hydropower projects within the Commission's jurisdiction. For instance, under section 30, 16 U.S.C. § 823a (1982), the Commission is authorized to make the final determination as to whether "manmade conduit" projects (operated primarily for agricultural, municipal, or industrial water supply purposes) should be exempted from licensing and other requirements, while the final authority to impose binding conditions on such exempted projects is reserved to state and federal fish and wildlife agencies.[19] An identical arrangement was adopted under section 408 of the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (1980) (amending sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978) (codified at 16 U.S.C.

[19] Section 30(c) provides in part, "[T]he Commission . . . shall include in any such exemption—(1) such terms and conditions as the Fish and Wildlife Service and the State agency each determine are appropriate to prevent the loss of, or damage to, such resources and to otherwise carry out the purposes of [the Fish and Wildlife Coordination] Act . . . ." 16 U.S.C. § 823a(c) (1982).

§§ 2705, 2708 (1982)), for projects of five megawatts or less.[20] (Both the "conduit exemption" and the "five megawatts or less exemption" operate through section 30(c) of the FPA.)

In its implementing regulations for the "five megawatts or less exemption" the Commission specifically rejected the argument of commenters that it should evaluate the reasonableness of agency conditions.[21]

> Article 2 [to be included in each exemption] requires compliance with any conditions prescribed by fish and wildlife agencies. Commenters claim that this is a forfeiture of Commission responsibilities which will deter exemption applications. they [sic] request that the Commission prescribes [sic] lenient environmental conditions where appropriate or possible, eliminate Article 2 where state licensing procedures exist, or at least urge other agencies to make conditions minimal. Section 408 of the ESA [Energy Security Act], which incorporates part of section 30 of the [Federal Power] Act, gives fish and wildlife agencies authority to establish *binding exemption conditions* for carrying out the purposes of the Fish and Wildlife Coordination Act. The Commission will not interpret the statute otherwise. However, it is for the Commission to insert the recommendations of those other agencies as conditions of an exemption.

Preamble to Five Megawatts or Less Rules, 45 Fed. Reg. 76,115, 76,120 (1980) (emphasis added).

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[20] "The Commission may in its discretion . . . grant an exemption . . . subject to the same limitations (to ensure protection for fish and wildlife as well as other environmental concerns) as those which are set forth in subsections (c) and (d) of section 30 of the Federal Power Act . . . ." Energy Security Act of 1980 § 408(b), 16 U.S.C. § 2705(d) (1982).

[21] The implementing regulations for the conduit exemption are in accord. "The construction, operation, and maintenance of the exempt facility must comply with any terms and conditions that any Federal or State fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act." Conduit Exemption Rules, 18 C.F.R. § 4.94 (1983).

In three cases in the last two years the Commission has reiterated this position. In each of these cases applicants for exemptions urged the Commission to reject conditions offered by other agencies as unreasonable. In each case the Commission insisted that it has no power to second guess the resource agencies. "It is not within our authority to review conditions imposed by fish and wildlife agencies pursuant to section 408 of the ESA [Energy Security Act]." Order on Appeal, *Swanson Mining Corporation and Walter M. Gleason, Project No. 5677-000,* 20 FERC ¶ 61,226 (1982) (a petition for rehearing on an unrelated issue was granted by the Commission in an unpublished order on April 22, 1983).[22] "The Commission has no authority to modify the requirement [for minimum flows imposed by a state fish and wildlife agency]." Order Denying Appeal, *Southern Pacific Land Company, Project No. 5585-000,* 19 FERC ¶ 61,297 (1982). "[W]e find that recommendation of 150 cfs [cubic feet per second] of minimum flow is a mandatory condition .... Consequently, there is no reason for the Commission to hold a hearing on the minimum flow issue, as requested by Sierra." Order on Rehearing, *Sierra Pacific Power Company, Project Nos. 4161-000, 4162-000, 4163-000, 4164-000,* 19 FERC ¶ 61,307 (1982).

The Commission's position on section 30(c) simply cannot be reconciled with its position on section 4(e). The operative language of the conditioning authority under the licensing provision (section 4(e)) and the exemption provision (section 30(c)) is virtually identical. Section 4(e) uses the words "shall be subject to and contain such conditions". FPA § 4(e), 16 U.S.C. § 797(e) (1982). Section 30(c) tracks this language closely with the words "shall include in any exemption such terms and conditions". FPA § 30(c), 16 U.S.C. § 823a(c) (1982).

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[22] In the *Swanson* order the Commission also states that it is not bound to include terms and conditions "related not to that project's environmental impact." Conservationists have no quarrel with this contention. But that, of course, is not the question in this case. Here the Commission, while conceding that the conditions fall within the scope of section 4(e), insists on rejecting them nevertheless because it does not like the result reached by Interior.

The two provisions cannot be distinguished on the basis of what they say about the nature of the conditioning authority, because they both say the same thing. More importantly, the Commission's elaborate "contextual" argument—that section 4(e) somehow changes meaning when read in the context of the whole Federal Power Act—collides with the Commission's contrary position on section 30(c). Both provisions come from the same Act and must therefore be read in the same context. If the "comprehensive" nature of the FPA does not require the Commission to be the final arbiter of conditions under section 30(c), then this same context can hardly mandate the opposite result when applied to the nearly identical language of section 4(e).

C. Congress Has Adopted a Similar Division of Responsibility for Other Agencies.

The notion that one federal agency should be charged with issuing a license, permit, lease, or other authorization while a different federal agency is authorized to specify binding conditions is hardly novel. Under the mining laws, for example, Interior's Bureau of Land Management issues mineral leases, while other land managers attach conditions when the mining will occur on such agency's land.[23]

The question of whether the mineral leasing agency may review the reasonableness of the conditioning agency's conditions bears an obvious resemblance to the question posed here under the Federal Power Act. The issue has been litigated, and

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[23] The Mineral Leasing Act for Acquired Lands of 1947 provides, "No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit, or holding a mortgage or deed of trust secured by such lands which is unsatisfied of record, *and subject to such conditions* as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered . . . ." 30 U.S.C. § 352 (1976 & Supp. V 1981) (emphasis added).

the government has consistently taken the position that one agency may not second guess the other.[24]

Of course, whether in the context of a mining lease application or a hydroelectric license application, an applicant who believes that the conditioning agency has acted unreasonably may seek relief in court.[25] The point is that under the mining law abuse of agency power must be corrected by a judge, not another agency. Conservationists can conceive of no rationale for a different result under the parallel provisions of the power law.

D. The Legislative History of the Federal Power Act Affirms the Plain Meaning of Section 4(e).

A thorough examination of the legislative history of the Federal Power Act yields no persuasive evidence that Congress intended anything different from what it said in section 4(e). Indeed, it strongly supports the interpretation adopted by the Ninth Circuit in the case below.

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[24] In *Sallie B. Sanford*, 22 Interior Board of Land Appeals 289 (1975), the Interior Board of Land Appeals upheld a Bureau of Land Management decision granting a lease to the applicant subject to conditions which the U.S. Army Corps of Engineers, which administers the land where the lease was to be located, had submitted to the Bureau. The appeals board held that the Bureau of Land Management had properly required the applicant to accept the stipulations or suffer a rejection of the offer to grant the lease; and further stated that the BLM had no authority to issue the lease free of the stipulations.

This interpetation had previously been upheld by the Department of Interior in *Duncan Miller*, 79 Interior Dec. 416 (1972). In distinguishing between the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. V 1981) and the Mineral Leasing Act for Acquired Lands Act of 1947, 30 U.S.C. §§ 351-359 (1976 & Supp. V 1981), the Board of Land Appeals explained that the latter expressly provided that the Secretary could only lease the applicable lands subject to those conditions which the executive department or agency having jurisdiction over the land had prescribed to insure the adequate utilization of the lands for the primary purpose for which they had been acquired. It stated further, "This Board has recognized this obligation even where it has appeared to the Board that the special stipulations requested by the administering agency were unreasonable." 79 Interior Dec. at 420 (1972), (citations omitted).

[25] *See* this brief at 18-19.

There is no disagreement with petitioners' assertion that the purpose of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920) (hereinafter "1920 Act")[26] was to "centralize authority in the Commission, 'instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted' ". Commission's Brief at 21 (quoting *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946)). Statements of this general purpose found in the legislative history, *see* Commission's Brief at 21-25; Developers' Brief at 34-35,[27] are hardly surprising and certainly of no consequence to the issue at hand.

Far more significant are the three direct references in the legislative history of the 1920 Act to the section 4(e)[28] conditioning proviso. Each of these conforms to the plain meaning of section 4(e).[29]

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[26] The Federal Water Power Act of 1920 was later incorporated, as Subchaper I, into the Federal Power Act, Power Act Amendments of 1935, ch. 687, 49 Stat. 838 (1935).

[27] Much of petitioners' discussion of the legislative history actually explores the 1930 amendments to the 1920 Act, Power Act Amendments of 1930, ch. 572, 46 Stat. 797 (1930). Commission's Brief at 25-26; Developers' Brief at 35-37. This history is not even directed to section 4(e)—which has never been amended—and, even if it were, would be of limited utility in interpreting congressional intent ten years earlier. "Thus, even when it would be otherwise useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

[28] Section 4(e) of the FPA was designated section 4(d) in the Federal Water Power Act of 1920.

[29] Mr. O. C. Merill, the principal architect of the bill, summarized the conditioning authority as follows:

> Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forest as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.
>
> This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.

(footnote continues)

E. The Reading of Section 4(e) Urged by Developers and the Commission Would Render the Provision a Nullity.

It is not to be presumed that Congress means merely to restate the obvious when it enacts provisions of law.[30] Yet this is precisely the result urged upon the Court by petitioners in their claim that section 4(e) merely authorizes federal land managers to make recommendations to the Commission. This

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(footnote continued)

Memorandum of O.C. Merrill, Chief Engineer, Forest Service at 6 (Oct. 31, 1917), Joint Appendix at 369, 373-74.

During a floor debate Senator Walsh spoke in opposition to an amendment to the 1920 Act to create a tribal veto for projects on Indian lands because the Indians' interests were already well protected under section 4(e):

> [T]he matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. Furthermore, the head of the department must agree; that is to say, the Secretary of the Interior in the case of an Indian reservation must agree that the licence shall be issued.

59 Cong. Rec. 1564 (1920); *see* Developers' Brief at 14.

Secretary of Agriculture David F. Houston testified along the same line:

> If I am not mistaken, the provisions in the proposed measure are more restrictive than existing law, in that they require the assent of three heads of departments [the Departments of War, Agriculture, and Interior which formed the original Commission] and also the assent of the particular head of the department immediately charged with that government interest.

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2nd Sess., at 678 (1918).

[30] "A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing." C. D. Sands, 2A Sutherland Statutes and Statutory Construction § 45.12 (4d ed. 1973). In other words, statutes are to be read in such a way that they add something to the law. It is a "well-established rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Wescott and Dunning, Inc.*, 412 U.S. 609, 633 (1973).

is so because federal agencies need no special authorization to recommend conditions to the Commission. Any interested person may do that.[31]

The suggestion that section 4(e) conditions were meant to be mere recommendations is even more pointless when considered in the context of the provision's origins in the Federal Water Power Act of 1920, at which that time the Secretaries of the Interior and Agriculture actually sat on the Commission. They clearly did not need section 4(e) in order to make "recommendations" to their fellow Commissioners. If section 4(e) adds anything, it must shift from the Commission to federal land managers the authority to *decide* what mitigation measures are needed to protect federal reservations.

F. Developers Are Free To Challenge Any Conditions Included by Interior Which They Believe To Be Unreasonable.

Developers and the Commission refer frequently in their briefs to the "veto power" section 4(e) would bestow upon federal land managers if its plain meaning were adopted. Developers' Brief at 34, 35, 38; Commission's Brief at 11, 14, 20. But no such veto power is claimed by Interior. If developers are dissatisfied with the conditions included by Interior, their remedy is simple. They may go to court and urge that the conditions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982).[32] Interior and other land managers are no more immune from judicial review than is the Commission.

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[31] The Commission's rules provide for participation in licensing proceedings through protests (which are essentially comments) and through intervention. 18 C.F.R. § 385.211 (1983) (dealing with protests); 18 C.F.R. § 385.214 (1983) (dealing with intervention). The Departments of the Interior and Agriculture routinely comment and frequently intervene in such proceedings.

[32] On rehearing in the instant case the Ninth Circuit clarified procedures for judicial review. Review of all matters connected with the license—whether objections to decisions made by the Commission or to conditions imposed by other agencies—would be had in a single action in the U.S. Court of Appeals pursuant to the FPA's provision for direct review, FPA § 313(b),

(footnote continues)

Yet, rather than take advantage of this common form of action, developers and the Commission would construct a more complex mechanism for review. As they would have it, developers should present their argument on the reasonableness of Interior's conditions not directly to a court, but first to the Commission. The Commission would then sit in judgment on the "reasonableness" of the conditions found necessary by Interior. Should developers be dissatisfied with the Commission's conclusion, they might then appeal the Commission's determination to the U.S. Court of Appeals pursuant to FPA § 313(b), 16 U.S.C. § 825*l*(b) (1982).

But there the confusion begins. What should the Court of Appeals make of the record below? Presumably it would be required to judge whether the Commission acted arbitrarily in assessing the reasonableness of Interior's finding that the conditions were necessary. Such a convoluted judicial task—in which the court must review the reasonableness of one agency's assessment of the reasonableness of another agency's finding—is without precedent in administrative law.[33]

How much simpler it would be for developers to go directly to the U.S. Court of Appeals once the license is issued and present their claim that the conditions mandated by the land manager are arbitrary and capricious. Simple, but much less satisfying to the developers, of course, than getting two bites at the apple.

(footnote continued)

16 U.S.C. § 825*l*(b). *Escondido Mutual Water Co. v. FERC*, 701 F.2d 826, 827 (9th Cir. 1983), Appendix to Petition at 31. While the Ninth Circuit did not state which standard of review would be applicable to review of such conditions, it seems clear to conservationists that the "arbitrary and capricious" standard, Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982), would apply. While other aspects of the relicensing decision may be subject to the more searching "substantial evidence" test, Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1982), the decision of the land manager regarding licensing conditions is informal agency action not requiring a hearing "on the record" Administrative Procedure Act §§ 5, 7, 8, 5 U.S.C. §§ 554, 556, 557 (1982).

[33] Would, for example, the court be required to determine whether the Commission failed to consider a relevant factor in its determination that the land manager overlooked another relevant factor?

III. THE COMMISSION'S INTERPRETATION OF SECTION 4(e) SHOULD BE GIVEN NO MORE DEFERENCE THAN INTERIOR'S CONTRARY INTERPRETATION.

Petitioners insist that this Court is bound to give "great deference" to the longstanding interpretation of the FPA offered by the Commission. Developers' Brief at 37-38; *see* Commission's Brief at 33. This argument may be disposed of easily.

Each of the many cases this Court has decided on the issue of deference to agency interpretation of law deal with challenges by a private party to decisions or interpretations of a single regulatory agency. Such is not the circumstance here. Instead, positions taken by two federal agencies, each charged with important regulatory responsibilities under the same law, are in conflict. Each agency claims to have maintained its position long and consistently.[34]

There is no rule of administrative law or statutory construction which can resolve which agency shall receive "more" deference. (Should it be the oldest agency? The largest? The most independent? The most politically responsive?) In cases of conflict between agencies, the Court must let the statute speak for itself.

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[34] Conservationists do not find that the Commission's position has been held as long as it claims. The early cases cited by petitioners, Commission's Brief at 33; Developers' Brief at 37-38, do not appear to be on point. *See* Interior's Brief in Opposition to Petition for Certiorari at 19.

CONCLUSION

What began as a seemingly parochial Indian water rights dispute has escalated into a debate on the nation's policy of resource management. From a few cubic feet per second of water in an artificial waterway the stakes have grown to literally thousands of contests over the streams and rivers which cross the nation's public forests, mountains, and deserts.

In the next decade an estimated 3,000 applications for hydroelectric licenses will be filed by private parties on our national forests alone.[35] Whether the Secretaries charged by Congress with managing those reservations or the Commission established by Congress to monitor the development of the nation's water resources shall have the final say in conditioning those projects is no small matter.

Conservationists bear the scars of years of battle with the Commission over projects which would have flooded such priceless resources as Hell's Canyon on the Snake River dividing Oregon and Idaho or the New River Gorge in the Appalachian Mountains of North Carolina. (Both projects would have been licensed by the Commission but for the intervention of Congress.)[36] Consequently a check on the power of the Commission to authorize the destruction of such river resources seems to conservationists eminently sensible.

But neither the wisdom which conservationists see in the balancing of authorities related to river development on public lands, nor the efficiency the Commission sees in consolidating that power in its hands, is an issue for this Court to decide. Such questions are reserved for Congress. Congress has

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[35] *See* this brief at 5, n. 9.

[36] Hells Canyon National Recreation Area Act §§ 3(a), 4, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg-2, 1274(a)(12) (1982)) (prohibiting the Commission from issuing a proposed license on the Snake River); Act of Sept. 11, 1976, Pub. L. No. 94-407, 90 Stat. 1238 (1976) (codified at 16 U.S.C. §§ 1273(a), 1278(a) (1982)) (revoking a license granted on the New River).

considered, resolved, and spoken. Its conclusion is stated clearly in section 4(e). Conservationists urge that it be applied.

Respectfully submitted,

NATIONAL WILDLIFE FEDERATION,
AMERICAN RIVERS CONSERVATION COUNCIL,
CALIFORNIA TROUT,
COLORADO WILDLIFE FEDERATION,
ENVIRONMENTAL DEFENSE FUND,
ENVIRONMENTAL POLICY INSTITUTE,
FRIENDS OF THE EARTH,
FRIENDS OF THE RIVER, INC.,
IDAHO ENVIRONMENTAL COUNCIL,
IDAHO WILDLIFE FEDERATION,
IZAAK WALTON LEAGUE OF AMERICA, INC.,
MONTANA WILDLIFE FEDERATION,
NATIONAL AUDUBON SOCIETY,
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
OREGON WILDLIFE FEDERATION,
SIERRA CLUB,
TROUT UNLIMITED,
VERMONT NATURAL RESOURCES COUNCIL,
WILDERNESS SOCIETY, and
WYOMING WILDLIFE FEDERATION,

Amici Curiae

By: PATRICK A. PARENTEAU,
Counsel of Record
CHRISTOPHER H. MEYER
National Wildlife Federation
1412 Sixteenth Street, N.W.
Washington, D.C. 20036
202/797-6859
Attorneys for Amici Curiae

February 23, 1984

APPENDIX A

Detailed Statement of Interests

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation maintains its headquarters at 1412 Sixteenth Street, N.W., Washington, D.C. 20036 (telephone 202-797-6859). The Federation is the largest nongovernmental conservation education organization in the world, with affiliate organizations in fifty-one states and territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of our natural resources. The Federation undertakes a comprehensive conservation education program, distributes numerous periodicals and educational materials, lobbies for the adoption of laws to protect and improve the environment, and litigates when necessary to conserve natural resources and wildlife. The Federation's Water Resources Program has undertaken a broad range of legal, legislative, administrative, and educational initiatives aimed at improving the management of our nation's rivers with particular attention given to the sensitive and intelligent development of hydroelectric power. In addition, the Federation's Public Lands and Energy Program actively promotes the conservation of energy from hydroelectric and other power sources.

American Rivers Conservation Council is a nonprofit membership organization incorporated in the District of Columbia. Organized in 1973, it now counts over 4,000 members nationwide. Its business address is 323 Pennsylvania Avenue, S.E., Washington, D.C. 20003 (telephone 202-547-6900). The American Rivers Conservation Council is the only national citizens group dedicated exclusively to river conservation. Its principal activities include seeking additions to the National Wild and Scenic Rivers System, support for state and local river conservation programs, opposition to wasteful or destructive water projects, and expansion of public awareness and appreciation of our river heritage. The Council publishes *American Rivers,* a quarterly journal of river conservation.

California Trout is a nonprofit, tax-exempt corporation organized under the laws of the state of California and having its principal office and place of business at 550 California Street, San Francisco, California 94104 (telephone 415-392-8887). California Trout is a statewide conservation organization supported by sport fishermen, with approximately 1,600 individual members and forty affiliated local angling clubs representing another 2,000 persons. California Trout was organized in 1970 to protect and restore wild trout, native steelhead, and the waters that nurture them in California. California Trout has intervened in numerous licensing proceedings before the Federal Energy Regulatory Commission.

The Colorado Wildlife Federation is organized under the laws of the state of Colorado and is affiliated with the National Wildlife Federation whose goals and objectives it shares. It maintains its headquarters at P.O. Box 18887, Denver, Colorado 80218 (telephone 303-830-2557).

The Environmental Defense Fund is a nationwide public interest organization with approximately 45,000 members. Its staff of lawyers, scientists, and economists works to protect and improve environmental quality and public health. The Fund pursues responsible reform of public policy in the fields of energy and resource conservation, pest control, toxic chemicals, water resources, air quality, land use and wildlife, working through research, public education, and judicial, administrative, and legislative action. The Environmental Defense Fund is organized under the laws of the state of New York with its headquarters at 444 Park Avenue, South, New York, New York 10016 (telephone 212-686-4191).

The Environmental Policy Institute is a nonprofit organization incorporated under the laws of the District of Columbia in 1974. The Institute engages in research, public education, lobbying, and litigation activities in support of energy and water conservation, the protection of air, water and land resources, the safe and clean use of coal, oil, and natural gas, limitations on the use of nuclear power and weaponry, and the protection of agricultural resources and the nation's food resource base. The Institute has over 10,000 contributors and

supporters from around the country. The organization maintains its headquarters at 218 D Street, S.E., Washington, D.C. 20003 (telephone 202-544-2600).

Friends of the Earth is a nonprofit corporation founded in 1969 under the laws of the state of New York. Its headquarters are located at 1045 Sansome Street, San Francisco, California 94111 (telephone 415-433-7373). Friends of the Earth is a national conservation organization with 32,000 members in the United States, and international affiliate organizations in twenty-six other countries. Since its founding, Friends of the Earth has worked to secure preservation and protection of the nation's heritage of outstanding free-flowing rivers and streams, the diminution of which has become an increasing concern to the organization's members in recent years.

Friends of the River, Inc. is organized under the California nonprofit corporation law for the purpose, in part, of advocating the preservation of riparian ecosystems and the natural values of free-flowing rivers in the western United States. Friends of the River actively pursues these goals through its legal, administrative, legislative, research, and public education programs. It maintains its headquarters at Building C, Fort Mason, San Francisco, California 94123 (telephone 415-771-0401). Currently Friends of the River has 3,000 members in more than thirty states.

The Idaho Environmental Council was founded under the laws of the state of Idaho to coordinate and stimulate the creative ideas, manpower, and financial resources of conservation-minded individuals and organizations to provide an increased understanding of modern man's impact upon his environment. The Council is headquartered at P.O. Box 1708, Idaho Falls, Idaho 83401 (telephone 208-345-2030).

The Idaho Wildlife Federation is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. It is organizated under the laws of the state of Idaho, and maintains its offices at 432 S. 11th Street, Pocatello, Idaho 83201 (telephone 208-233-3079).

The Izaak Walton League of America, Inc. is organized to promote means and opportunities for educating the public to

conserve, maintain, protect, and restore the soil, forest, water, air, and other natural resources of the United States, and to promote the enjoyment and wholesome utilization of those resources. The League is organized under the laws of the state of Illinois, and is headquartered at 1701 North Fort Myer Drive, Suite 1100, Arlington, Virginia 22209 (telephone 703-528-1818).

The Montana Wildlife Federation is an affiliate of the National Wildlife Federation whose goals and objectives it shares. The Montana Wildlife Federation is organized under the laws of the state of Montana and is headquartered at P.O. Box 3526, Bozeman, Montana 59715 (telephone 406-587-1713).

The National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It is devoted to conservation and protection of the natural environment which supports both humankind and wildlife. The Society's 512,000 members in 492 chapters are backed by a full-time staff of 130 persons working in the New York headquarters, Washington, D.C. office, four state offices, four camps, four nature centers, two research centers, and ten regional offices. The staff includes scientists and other professionals specialized in water policy. Among the Society's purposes is the wise use of the nation's water resources and protection of riparian and aquatic habitat. The Society is a nonprofit corporation organized under the laws of the state of New York with headquarters at 950 Third Avenue, New York, New York 10022 (telephone 212-832-3200).

Natural Resources Defense Council, Inc. is a nonprofit membership organization incorporated under the laws of the state of New York. Its headquarters are at 122 East 42nd Street, New York, New York 10168 (telephone 212-949-0049). The Council has approximately 28,000 members residing in all states and territories. Since its inception in 1970, the Natural Resources Defense Council has been dedicated to the prudent management and the wise use of the natural resources of the earth, including energy and water resources, through the advocacy of effective federal, state, and local laws.

The Oregon Wildlife Federation is an affiliate of the National Wildlife Federation whose goals and objectives it shares. The Oregon Wildlife Federation is organized under the laws of the state of Oregon. It maintains its offices at 2753 N. 32nd, Springfield, Oregon 97377 (telephone 503-747-8400).

The Sierra Club is a nonprofit corporation, organized under the laws of the state of California, having its principal office and place of business at 530 Bush Street, San Francisco, California 94108 (telephone 415-981-8634). The Sierra Club is a national conservation organization founded in 1882 with approximately 330,000 members. The purposes of the Sierra Club are to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environment.

Trout Unlimited is a nonprofit international conservation organization incorporated in 1959 under the laws of the state of Michigan. The organization maintains its headquarters at 501 Church Street, N.E., Vienna, Virginia 22180 (telephone 703-281-1100). Its 37,000 members are dedicated to the protection of clean water and the enhancement of trout and salmon resources. Trout Unlimited's twenty-five years of work to enhance salmonoid habitat has involved its members in educational programs, water quality surveillance programs, and field projects designed to restore degraded habitats and provide up- and down-stream passages for fish migration.

The Vermont Natural Resources Council is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. The Council is organized under the laws of the state of Vermont and maintains its headquarters at 7 Main Street, Montpelier, Vermont 05602 (telephone 802-223-2328).

The Wilderness Society is a national conservation organization with approximately 105,000 members nationwide. It is incorporated in Washington, D.C. and maintains its headquarters at 1901 Pennsylvania Avenue, N.W., Washington, D.C. 20006 (telephone 202-828-6600). A primary concern of the Society since its founding in 1935 has been the establishment

and proper management of wilderness areas. Protection of wild and free-flowing rivers through wilderness and wilderness candidate areas is integral to the preservation of their wilderness character. Efforts to preserve wild and free-flowing rivers are ranked high on the Society's conservation agenda.

The Wyoming Wildlife Federation is a state affiliate of the National Wildlife Federation whose goals and objectives it shares. It is organized under the laws of the state of Wyoming and is headquartered at P.O. Box 333, Cheyenne, Wyoming 82003 (telephone 307-637-5433).

APPENDIX B*

Letter to R. Max Peterson, Chief, U.S. Forest Service, January 4, 1984

HAND DELIVER
January 4, 1984

R. Max Peterson, Chief
United States Forest Service
P.O. Box 2417
Washington, D.C. 20013

Attention: Richard D. Hull
Director of Lands
United States Forest Service

Dear Chief Peterson:

The National Wildlife Federation and other environmental organizations are deeply concerned with the exponential growth in proposals for hydroelectric power projects within national forests and other federal reservations. We would appreciate an answer to each of the following questions regarding the numbers of development proposals within reservations under the Secretary of Agriculture's jurisdiction, and the process by which the Secretary exercises his responsibilities under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1982), and other applicable law in protecting, managing, and utilizing these lands and resources.

1. Please describe the process used by the Department of Agriculture to develop necessary conditions pursuant to section 4(e) for hydroelectric power licenses within reservations under the jurisdiction of the Secretary of Agriculture.

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* In appending this correspondence to their brief, amici curiae do not seek to supplement the record on review. Rather they wish solely to identify matters of public fact, *Muller v. Oregon*, 208 U.S. 412, 419-21 (1907) (on "the Brandeis brief"), which demonstrate the gravity of problem posed.

2. During fiscal year 1983, how many hydroelectric power applications (for licenses, permits, and exemptions) were noticed to the Department of Agriculture by the Federal Energy Regulatory Commission within reservations under the Secretary's jurisdiction? What percentage of all applications noticed during fiscal year 1983 do the applications within these reservations constitute? If possible, please provide a breakdown (1) by category of application (license, permit, and exemption) and (2) by reservation, for these applications.

3. In approximately what percentage of cases, both historically and currently, does the Secretary of Agriculture exercise his conditioning power under section 4(e) with respect to applications for licenses within reservations under the Department's jurisdiction? In what percentage of these cases does the Commission include without significant modification all the conditions imposed by the Secretary in the licenses it issues? How does the Department deal with those instances in which the Commission significantly modifies or rejects conditions which the Department has found necessary to impose?

Sincerely,

Christopher H. Meyer
Counsel
Water Resources Program

Letter from R. M. Housley, Deputy Chief, U.S. Forest Service, January 17, 1984

United States Department
of Agriculture
Forest Service
Washington Office
12th & Independence, SW
P.O. Box 2417
Washington, D.C. 20013

Reply to: 2770
Date: Jan 17 1984

Mr. Christopher H. Meyer
Counsel
Water Resources Program
National Wildlife Federation, NW
Washington, D.C. 20036

Dear Mr. Meyer:

This is in response to your January 4 letter and Dave Conrad's discussions with members of our Lands Staff, concerning the Department of Agriculture's role in the Federal Energy Regulatory Commission (FERC) hydroelectric licensing process.

Answers to your questions are as follows:

Question 1. Exhibit 1 includes a flow chart and a general description of our process for handling FERC projects. Special conditions are only developed to avoid or mitigate environmental impacts caused by project operations not adequately covered in the Commission's standard form license articles. The special conditions are drafted by functional specialists most knowledgeable of the impact. They are then subjected to a rigid review to assure clarity, applicability, reasonableness, that the conditions are within our jurisdictional authority and that they conform to Agency and Department policy.

Question 2. The number of hydroelectric power applications reviewed by the Department during fiscal year 1983 is

shown in Exhibit 2. The table breaks the data down by type of applications, type of action, and by Forest Service Region. The table distinguishes between those affecting National Forest System (NFS) lands and other (non-FWS) lands.

Question 3. The Secretary of Agriculture exercises his conditioning power under Section 4(e) on all license applications directly affecting Department programs. This amounts to about 60 percent of all license applications. Approximately 66 percent of our section 4(e) responses to FERC include one or more special license conditions. The Commission includes without significant modification approximately 80 percent of these special conditions in licenses issued.

How we have handled the significant modifications or rejections depends on the seriousness of the impact, the overall reasonableness of our request, extraneous circumstances, such as cases where the license had been issued before FERC had received our 4(e) report. Exhibit 3 includes samples of our 4(e) report, how they were handled by the Commission and a note on our follow up action if any.

Our basic approach is to notify FERC of the discrepancy if significant and, since the passage of the Federal Land Policy and Management Act (FLPMA), deny the licensee access to NFS lands. After exhausting the administrative appeal process, our backup is through litigation.

Sincerely,

R. M. Housley
Deputy Chief

[Attachments omitted]

Letter from J. B. Hilmon, Acting Deputy Chief, U.S. Forest Service, February 14, 1984

United States Department
of Agriculture
Forest Service
Washington Office
12th & Independence, SW
P.O. Box 2417
Washington, D.C. 20013

Reply to: 2770
Date: February 14, 1984

Mr. Christopher H. Meyer
1412 Sixteenth Street, NW
Washington, D.C. 20036

Dear Mr. Meyer:

This supplements our January 17 letter concerning the Department of Agriculture's role in the Federal Energy Regulatory Commission (FERC) hydroelectric licensing process.

An extrapolation of data derived from an analysis of applications for license or amendment of license received during the past four years indicates that in the next decade some 3,000 applications will be filed with the Federal Energy Regulatory Commission that will affect National Forest lands. Each application is reviewed carefully and conditions are developed to adequately protect or mitigate damage to resources under our charge. The purposes of the conditions are compromised when FERC substantially modifies or rejects our recommendations.

Based on a sampling of 201 license (or amendment) applications, where licenses were issued during the period between April 18, 1980, and January 13, 1984, or pending as of January 30, 1984, we find that out of 19 licenses issued during this period affecting National Forest lands, in 13 instances the Secretary of Agriculture included conditions by authority of

Section 4(e) FPA (41 Stat. at 1065) as amended. Of the 13 cases where 4(e) conditions were included:

6 were accepted by the Commission without substantial modification;

1 was accepted but with substantial modification;

3 of the cases involved some outright rejections of our 4(e) conditions; and

3 of the cases involved Commission-issued licenses where all of our 4(e) conditions were rejected.

Although this is not an inclusive listing of all license cases under review during this period, we do feel this is a representative sample.

The Secretary of Agriculture exercises special care in establishing specific 4(e) conditions which we believe to be essential and in distinguishing these conditions from general comments or recommendations regarding FERC applications for license applications (See Tables 1 and 2, enclosed).

Sincerely,

J. B. Hilmon
Acting Deputy Chief

Enclosures

[Attachment to Letter of February 14, 1984]

TABLE 1

	1 No. of Projects Reviewed in Sample [4]	2 4(e) Letter to FERC No. (%)[1]	3 4(e) Included in Letter No. (%)[2]	4 Conditions Without Substantial Modification No. (%)[3]	5 With Some Substantial Modifications No. (%)[3]	6 With Some Rejections No. (%)[3]	7 Where All Were Rejected No. (%)[3]
Licenses Issued or Amended							
Involving FS Lands							
Licenses	19	13	13	6	1	3	3
Amendments	20	11	8	3	1	1	3
Subtotal	39	24(62)	21(88)	9(43)	2(10)	4(19)	6(28)
Other Lands							
Licenses	40	14	1	1			
Amendments	17						
Subtotal	57	14(25)	1(7)	1(100)			
Total Issued or Amended	96	38(40)	22(45)	2(45)	2(9)	4(18)	6(27)
Licenses or Amendments Pending as of 1/30/84							
Involving FS Lands							
Licenses	72	72	43				
Amendments	4	4	3				
Subtotal	76	76(100)	46(61)				
Other Lands							
Licenses	29	29	4				
Amendments							
Subtotals	29	29(100)	4(14)				
Total Pending	105	105(100)	50(48)				
Total Reviewed	201						

[1] Column 2 % Column 1

[2] Column 3 % Column 2

[3] Columns 4, 5, 6, or 7 % Column 3

[4] Sample a sampling of licenses and amendments issued during April 18, 1980, and January 13, 1984, or pending as of January 30, 1984.

[Additional Attachment omitted]